

INTERIOR BOARD OF INDIAN APPEALS

Estate of Homer James Medicinebird

8 IBIA 289 (05/21/1981)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS INTERIOR BOARD OF INDIAN APPEALS 4015 WILSON BOULEVARD ARLINGTON, VA 22203

ESTATE OF HOMER JAMES MEDICINEBIRD

IBIA 80-27

Decided May 21, 1981

Appeal from order by Administrative Law Judge Daniel S. Boos approving will and ordering distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the agency attorney who prepared decedent's will testified he took special notice of decedent's appearance and behavior because he knew decedent was dying, his uncontradicted observations concerning decedent, together with testimony concerning the circumstances of the will execution from the witnesses to the will and the interpreters present indicate decedent was competent to make a will and was not acting under duress. The fact that decedent's cousins were each left \$1 under the will, while the bulk of the estate vas devised to a nonrelative was not, under the circumstances, an indication that undue influence was sought to be exerted upon decedent by the principal beneficiary of his will.

2. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where decedent's cousins, his nearest relatives, contested his will claiming decedent was the victim of undue influence practiced by the principal beneficiary of his will, their testimony that, at unspecified times prior to executing his will, decedent complained that others, including the principal beneficiary,

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wanted his trust property, was, under the circumstances, insufficient to show that an attempt was made to exert undue influence upon decedent. Moreover, there was no showing that decedent was susceptible to influence by anyone, nor was there proof of circumstances surrounding the will execution to suggest the will of decedent was coerced. In the absence of a showing of the successful imposition of the will of another for that of the testator, his will was properly approved.

APPEARANCES: Laurence R. Martin, Esq., for appellants Rosa Pine, Ruby S. Flying, Eldora S. Bement, Clarence E. Spottedwolf, Mollie S. Small, James Spottedwolf, Josephine S. Cooper, Adaline S. Spang, and Clifford Spottedwolf.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On September 19, 1977, Homer James Medicinebird, the beneficial owner of interests in trust real property, died in Big Horn County, Montana, at the age of 63. His nearest living relatives were nine cousins, appellants here. Decedent's will dated September 6, 1977, bequeathed each cousin \$1, leaving the bulk of his trust estate to Susan Yelloweyes Carlson, a nonrelative.

A series of probate hearings on May 23, 1978, September 13, 1978, May 9, 1979, and June 26, 1979, appellants sought to show decedent lacked testamentary capacity on the day he made his will and offered evidence for the purpose of demonstrating that the principal beneficiary had exercised undue influence over decedent to obtain the devise of his trust property to her. On appeal they urge the order approving will should be vacated and the will held invalid for the same reasons.

To support their appeal, appellants rely upon the circumstances of decedent's disease to support their contention he lacked capacity to make a will. Thus, to support the contention decedent was incompetent to make a will they point to testimony that he was dying, spoke in a whisper, was in discomfort, sometimes exhibited apparent confusion concerning relationships with others, did not know the balance in his Individual Indian Money (IIM) account, and was unsure about the disposition of some of his (nontrust) personal property. Appellants also urge that because the principal beneficiary of the will called the agency to arrange for decedent's will to be made at the hospital where decedent was a patient, that fact indicates the exertion of undue influence, when considered together with a pending application by the beneficiary for guardianship of decedent, the fact of decedent's weakened condition, the opportunity for undue influence inherent in decedent's dependance upon Mrs. Carlson, and the unnaturalness inherent in the disposition of the decedent's principal assets to a nonrelative

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Since the contentions concerning the circumstances surrounding the will execution are essentially factual, the last issue raised the question of unnaturalness of the will is first considered.

[1] <u>Tooahnippah v. Hickel</u>, 397 U.S. 598 (1970), establishes that a will executed in conformity to Departmental regulation is valid, absent proof of the successful imposition of the will of another for that of the testator. Arguments addressed to considerations whether a devise is "natural" or "unnatural" carry little weight in Indian probate matters, since the Secretary lacks power to rewrite wills to suit popular or personal notions of fitness. <u>Estate of Leona Hunts Along Hale</u>, 8 IBIA 8, 87 I.D. 64 (1980). Even were this not the rule, nothing in the record on appeal indicates that the devise to Mrs. Carlson is unnatural. The circumstances recorded by the testimony indicate she was decedent's oldest and nearest friend and therefore may have been the most natural beneficiary he could have selected.

The testimony of the witnesses to the will and the attorney who prepared it indicates they were alone with decedent in the hospital on two occasions while they discussed the will. Decedent dictated the terms of the will to the attorney through two interpreters. Although decedent spoke mostly in Cheyenne, he also spoke English. And although he conferred with the persons assisting him in the will drafting, decedent controlled the terms of the document, and directed the will preparation according to stated personal preferences, for which he supplied reasons.

On September 6, 1977, when the will was executed, the same process of translation and discussion was repeated before the will was signed. All who witnessed the execution agree that decedent was a competent testator, although he was clearly very ill.

[2] Appellants testified about occasions when decedent indicated suspicion of Mrs. Carlson and others who he felt were covetous of his property. Assuming their testimony to be true, it falls far short of a showing that undue influence was exerted over decedent by Mrs. Carlson. The record indicates that decedent had no close relatives to care for him when, because of his disease, he became weakened and dependent. He turned to Mrs. Carlson, an old friend, who apparently gave him the consistent care he needed, and, more importantly to decedent, offered him the opportunity to leave the hospital when medical treatment could no longer prolong his life.

Appellants' evidence to show undue influence is wholly speculative; for example, it does not affirmatively appear Mrs. Carlson was his legal guardian. However, even if she were, there is no proof she took any action to secure for herself through the exercise of her office of trust the devise of decedent's property. Further, although decedent was weakened by the disease that killed him, he was not apparently affected mentally by his cancer. Although he spoke in a whisper,

his speech was sensible. The reasons he gave for his gift to Mrs. Carlson--their friendship and the prospect of continued care and a place to stay outside the hospital--are a fair explanation of his motives which indicate he was doing as he wished with his property. Similarly, references to decedent's IIM account are explained by the seasonal fluctuations in the account balance, while his references to lost personal property appear also to have been grounded in fact. Finally, the instances of supposed confusion concerning relatives postulated by appellants is unpersuasive. Thus, the language of the will does not incorrectly state a relationship when it refers to a cousin as a "friend." Although the existence of a stepsister referred to by decedent's will is not accepted by the Administrative Law Judge as a matter proved, it is clear from the record that a number of people believe that decedent did have a stepsister. The reference in his will to his stepsister indicates nothing more, in the circumstance of this case, than the probability that decedent was of a like opinion.

The evidence that decedent was a lucid testator is uncontradicted. Appellants have failed to show that the September 6, 1977, will was not the free act of a competent testator. The order approving will must be affirmed.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR.4.1, the order approving will dated August 24, 1979, is affirmed.

This decision is final for the Department.

	//original signed Franklin D. Arness Administrative Judge
I concur:	
//original signed Wm. Philip Horton Chief Administrative Judge	